A

Wu Siew Ying (t/a Fuh Lin Bud-Grafting Centre) v Gunung Tunggal Quarry & Construction Sdn Bhd & Ors

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO A-01–155 OF 1998 AND A-01–64 OF 1999
MOKHTAR SIDIN, AZMEL AND ZULKEFLI JJCA
18 SEPTEMBER 2007

C

Civil Procedure — Amendment — Defence — Application to amend defence made after closing submissions made — Minor amendment to correct a genuine mistake — Whether application should be allowed — Whether plaintiff ought to be compensated

D

Civil Procedure — Government proceedings — Proceedings against government — Proceedings commenced against government official more than four years after occurrence of event complained of — Whether action time-barred — Public Authorities Protection Act 1948 s 2(a) —

E

Land Law — Administration — Officers — Director of Land and Mines — Powers of — Whether only empowered to issue permit relating to extraction and removal of rock material — Whether endowed with supervisory power — National Land Code s 70

F

Land Law — Lease — Quarrying lease — Land leased to quarry operator by registered owner — Collapse of limestone hill on leased land damaging third party property — Whether registered owner liable in negligence and nuisance to third party

G

Tort — Nuisance — Quarrying — Collapse of limestone hill on quarry damaging third party property on adjacent land — Collapse not caused by quarrying work of quarry operator — Whether owner of registered quarry land liable to third party in nuisance

H

I

The plaintiff owned a plant nursery situated on a certain piece of land ('the plaintiff's land'). The first defendant operated a quarry on Gunung Tunggal — a natural limestone hill ('the hill') situated on land ('the quarry land') adjacent to the plaintiff's land. The second defendant was the registered owner of the quarry land which he had leased to the first defendant.

The third defendant had issued a permit under s 70 of the National Land Code to both the defendants allowing them to remove rock material from the quarry land. On 29 December 1987 following a severe thunderstorm, a large slice of the hill collapsed. Limestone rock debris fell onto the plaintiff's land and virtually destroyed his nursery. The collapse occurred at a time when the first defendant had shut down quarrying operations for the Christmas and New Year holidays. The plaintiff filed an action against the first and second defendants on 1 March 1988 for negligence and nuisance. On 26 May 1992 — some four years and five months after the collapse — the plaintiff brought in the third defendant as a party, also for negligence and nuisance. In the High Court, after the close of the case for the defence but before the pronouncement of judgment, the third defendant applied to amend his statement of defence. The third defendant had pleaded limitation and wanted to amend the words 'Akta Prosiding Kerajaan 1956 (Semakan 1988)' in para 5 of his defence, to read 'Public Authorities Protection Act 1948 (Act 198) (Revised 1988).' The plaintiff strongly objected to the application on the basis that the application was made at a very late stage. The parties had closed their cases, made their submissions and as such the application would be highly prejudicial to the plaintiff, alleged counsel for the plaintiff. However, the High Court allowed the third defendant's application and subsequently dismissed the plaintiff's claim against all three defendants. The plaintiff appealed to the Court of Appeal against the decisions allowing the third defendant's application and dismissing the plaintiff's case against all the defendants.

Held, dismissing the appeals with costs:

(1) Amendments to pleadings may be made at any stage of the proceedings before the pronouncement of the decision. It was thus not unlawful for the third defendant to make the application for amendment at such a late stage. The third defendant had already raised limitation in his defence, and the nature and purpose of the amendment was merely to state the correct and proper statute dealing with limitation to government proceedings. The third defendant had made a genuine mistake in quoting the wrong statute when putting up his defence of limitation. The nature of the amendment was such that no compensation was required to be made by the third defendant at all. The High Court judge had judiciously exercised his discretion in allowing the third defendant's application (see paras 10, 13 & 15); *Mohan Singh v Government of Malaysia* [1973] 2 MLJ 149 followed; *Tildeslev v Harper* 10 Ch D 386 and *Claraoede & Co v Commercial Union Association* 32 WR 263 referred.

(2) In view of the undisputed fact that the second defendant was merely the registered owner of the land which he had leased to the first defendant, who became the absolute occupier, the second defendant could not be held liable against the plaintiff, both in negligence and in nuisance. He was not at all involved in the quarry operations nor in the removal of rock materials (see para 47).

(3) There was no reason whatsoever for the Court of Appeal to disagree with the High Court judge's conclusion that the first defendant could not be held liable to the plaintiff in negligence and in nuisance. He had undertaken a very comprehensive consideration of the facts and had thoroughly and carefully evaluated the evidence of the witnesses, especially the evidence of the expert witnesses and their conflicting opinions (see para 48).

(4) The plaintiff should not have sued the third defendant at all. The suit against the third defendant was vexatious and frivolous as it was very clear that the third defendant — as the Director of Land and Mines — only possessed the power to issue a permit for the removal of rock material. He was not given any supervisory power under s 70 of the National Land Code. It was too remote to say that he was under a duty to take care statutorily or at common law. The plaintiff had also delayed in instituting action against the third defendant, thereby rendering applicable s 2(a) of the Public Authorities Protection Act 1948 (see para 49).

[Bahasa Malaysia summary

Plaintif memiliki tapak semaian tumbuh-tumbuhan terletak atas sebidang tanah ('tanah plaintif '). Defendan pertama mengendalikan suatu kuari di Gunung Tunggal — bukit batu kapur semulajadi ('bukit tersebut') yang terletak atas tanah itu yang bersebelahan dengan tanah plaintif. Defendan kedua merupakan pemilik berdaftar tanah kuari yang beliau telah dipajakkan kepada defendan pertama. Defendan ketiga telah mengeluarkan permit di bawah s 70 Kanun Tanah Negara kepada kedua-dua defendan membenarkan mereka mengalihkan bahan batuan dari tanah kuari itu. Pada 29 Disember 1987 berikutan satu ribut petir yang teruk, sebahagian besar daripada bukit tersebut runtuh. Serpihan batuan batu kapur jatuh ke atas tanah plaintif dan hampir memusnahkan tapak semaiannya. Runtuhan itu berlaku pada masa apabila defendan pertama telah menutup operasi menguari untuk cuti Hari Natal dan Tahun Baru. Plaintif telah memfailkan satu tindakan terhadap defendan pertama dan kedua pada 1 Mac 1988 kerana kecuaian dan kacau ganggu. Pada 26 Mei 1992 — kira-kira empat tahun dan lima bulan selepas runtuhan itu — plaintif telah memasukkan defendan ketiga sebagai satu pihak, juga kerana kecuaian dan kacau ganggu.

Di Mahkamah Tinggi, selepas penutup kes pihak pembelaan tetapi sebelum pengisytiharan penghakiman, defendan ketiga telah memohon untuk meminda penyataan pembelaan beliau. Defendan ketiga telah memplidkan had masa dan ingin meminda perkataan-perkataan 'Akta Prosiding Kerajaan 1956 (Semakan 1988)' dalam perenggan 5 pembelaannya, untuk dibaca Public Authorities Protection Act 1948 (Act 198) (Revised 1988)'. Plaintif dengan keras membantah permohonan tersebut dengan asas bahawa permohonan itu dibuat di peringkat yang agak lewat. Pihak-pihak telahpun menutup kes mereka, mengemukakan hujah-hujah mereka dan oleh itu permohonan tersebut amat prejudis terhadap plaintif, seperti yang dikatakan oleh peguam bagi pihak plaintif. Namun, Mahkamah Tinggi telah membenarkan permohonan defendan ketiga itu dan berikutan itu menolak tuntutan plaintif terhadap ketiga-tiga defendan. Plaintif telah merayu ke Mahkamah Rayuan terhadap keputusan-keputusan tersebut yang membenarkan permohonan defendan ketiga dan menolak kes plaintif terhadap ketiga-tiga defendan itu.

Diputuskan, menolak rayuan-rayuan tersebut dengan kos:

(1) Pindaan-pindaan kepada pliding boleh dibuat pada mana-mana peringkat prosiding sebelum pengisytiharan keputusan. Ia oleh itu tidaklah salah di sisi undang-undang untuk defendan ketiga membuat permohonan untuk pindaan di peringkat yang lewat itu. Defendan ketiga telahpun menimbulkan had masa dalam pembelaannya, dan sifat dan tujuan pindaan itu hanyalah untuk menyatakan statut yang betul dan wajar berkaitan had masa dalam prosiding kerajaan. Defendan ketiga telah membuat kesilapan yang tulen dalam memetik statut yang salah semasa mengemukakan pembelaan had masa beliau. Sifat pindaan sedemikian yang mana tiada pampasan langsung yang perlu dibuat oleh defendan ketiga. Hakim Mahkamah Tinggi dengan adil telah menggunakan budi bicaranya dalam membenarkan permohonan defendan ketiga tersebut (lihat perenggan 10, 13 & 15); *Mohan Singh v Government of Malaysia* [1973] 2 MLJ 149 diikut; *Tildeslev v Harper* 10 ChD 386 dan *Claraoede & Co v Commercial Union Association* 32 WR 263 dirujuk.

(2) Berdasarkan fakta yang tidak dipertikaikan bahawa defendan kedua hanya merupakan pemilik berdaftar tanah tersebut yang mana beliau telah pajak kepada defendan pertama, yang merupakan penghuni mutlak, defendan kedua tidak boleh dipertanggungjawabkan terhadap plaintif, kedua-dua untuk kecuaian dan kacau ganggu. Beliau tidak langsung terlibat dalam operasi kuari itu mahupun dalam pengalihan bahan batuan tersebut (lihat perenggan 47).

(3) Tiada alasan apa sekalipun untuk Mahkamah Rayuan untuk tidak bersetuju dengan kesimpulan hakim Mahkamah Tinggi bahawa defendan pertama tidak boleh dipertanggungjawabkan terhadap plaintif kerana kecuaian dan kacau ganggu. Beliau telah melakukan pertimbangan yang komprehensif berhubung fakta-fakta tersebut dan secara terperinci dan teliti menilai keterangan saksi-saksi, terutamanya keterangan saksi-saksi pakar dan pendapat mereka yang bercanggah (lihat perenggan 48).

(4) Plaintif tidak menyaman defendan ketiga langsung. Guaman terhadap defendan ketiga adalah remeh dan menyusahkan kerana ia adalah jelas bahawa defendan ketiga — sebagai Pengarah Tanah dan Galian — hanya memiliki kuasa untuk mengeluarkan permit untuk pengalihan bahan batuan. Beliau tidak diberikan apa-apa kuasa penyeliaan di bawah s 70 Kanun Tanah Negara. Jauh sekali untuk mengatakan bahawa beliau di bawah satu tanggungjawab untuk berhati-hati secara statutori atau di bawah common law. Plaintif juga lewat dalam memulakan tindakan terhadap defendan ketiga, yang menyebabkan s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 terpakai (lihat perenggan 49).]

Notes

For cases on defence, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 517–537.

For cases on officers, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2016–2032.

For cases on proceedings against government, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2850–2851.

For cases on quarrying generally, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1543–1587.

For cases on quarrying lease, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3106–3107.

Cases referred to

Anns & Ors v London Borough of Merton [1997] 2 All ER 492 (refd)

Claraoede & Co v Commercial Union Association 32 WR 263 (refd)

Leakey & Ors v National Trust for Places of Historic or Natural Beauty [1980] 1 All ER 17 (refd)

Legislation referred to

Civil Law Act 1956 s 3
National Land Code s 70
Public Authority Protection Act 1948 s 2(a)
Rules of the High Court 1980 O 20 r 5

Appeal from: Civil Suit No 22–58 of 1988 (High Court, Ipoh)

Chan Kok Keong (Norazali bin Nordin with him) (Chan & Associates) for the appellant.

NP Ramachandran (NP Ramachandran & Associates) for the first and second respondents.

Datuk Engku Nor Faizah (Perak State Legal Adviser) (Norazian, Senior Federal Counsel with her) for the third respondent.

Azmel JCA (now FCJ, delivering judgment of the court):

[1] The appellant/plaintiff filed two appeals against the decision of the learned High Court judge. The first appeal was against the order of the learned judge allowing the third defendant's application to amend his statement of defence substituting the words 'Akta Prosiding Kerajaan 1956 (semakan 1988)' with 'Public Authorites Protection Act 1948 (Act 198) (Revised 1988)'. And the second appeal was against the learned judge's decision dismissing the plaintiffs claims against the three defendants.

BACKGROUND FACTS

[2] The plaintiff was the owner of a plant nursery called Fuh Lin Bud-grafting Centre situated on a piece of land held under Lot No 32752, Mukim of Kampar, Perak. The first defendant was the operator of a quarry on a natural limestone hill called Gunung Tunggal on a plot of land held under Lot No 74258, situated adjacent to the plaintiff's land. The second defendant was the registered owner of the quarry land and he had leased it to the first defendant. The third defendant had issued a permit under s 70 of the National Land Code to the first and second defendants allowing them to remove rock materials from the quarry land.

[3] On both the southern and eastern faces of the hill were limestone overhangs over but not directly above the plaintiff's land. The plaintiffs nursery was situated some distance away from the hill slight away from the boundary of his land facing the hill.

[4] On 29 December 1987 at about 6.30am following a heavy rainfall and severe thunderstorm, a large slice of the hill collapsed causing the limestone rock debris to fall onto the plaintiff's land below and to spill over to the nursery virtually destroying it. Due to the damage caused to his land the plaintiff on 1 March 1998 filed suit against the first and second defendants for negligence and nuisance. Subsequently, on 26 May 1992, the plaintiff, brought in the three defendant, also for negligence and nuisance.

A **[5]** The hearing proceeded on with the plaintiff claiming against the three defendants. After the close of the case of the defence but before judgment was pronounced by the court, the third defendant applied to amend his statement of defence. It was strongly objected to by the plaintiff. After hearing arguments from both sides the learned judge allowed the third defendant's
B application. Hence the plaintiff's appeal against that the decision.

[6] The learned judge, after having considered all the submission by counsel of all parties in the light of the evidence adduced in court, dismissed
C the plaintiff's claim against the three defendants. Dissatisfied with the decision, the plaintiff also appealed to this court.

THE FIRST APPEAL

D **[7]** This appeal was filed by the plaintiff who was dissatisfied with the decision of the learned judge allowing the third defendant's application to amend his statement of defence. In this application the third defendant only wanted to amend the relevant law as regards limitation in respect of proceeding against him, a government officer. In para 5 of the statement of
E defence the third defendant had originally stated 'Akta Prosiding Kerajaan 1956 (Semakan 1988)'. He now wished to amend it to read 'Public Authorities Protection Act 1948 (Act 198) (Revised 1988)'. That's all that the third defendant wished to amend.

F **[8]** But the plaintiff strenuously objected to the application. The main grounds raised by the plaintiff to object to the application were that the application was made at a very late stage, after all parties had closed their cases and submissions had already been made and as such the application would be
G highly prejudicial to the plaintiffs case.

[9] The relevant law governing amendments to pleadings is O 20 r 5 of the Rules of the High Court 1980 ('the RHC'). It reads:

H 5. Amendment of writ or pleading with leave

1 Subject to Order 15 rules 6,7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on
I such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

2 Where an application to the Court for leave to make the amendments mentioned in paragraph (3),(4)or(5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the

Court may nevertheless grant, such leave in the circumstances mentioned in that paragraph it it thinks it just to do so.

3 An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

4 An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.

5 An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

[10] It has been a generally accepted principle that amendments to pleading can be made at any stage of the proceeding before the pronouncement of the decision. In the case of *Mohan Singh v Government of Malaysia* [1973] 2 MLJ 149, Sharma J in dealing with general principles of granting leave to amend pleadings quoted the decision of Bramwell LJ in the case of *Tildeslev v Harper* 10 ChD 386 at p 397:

> My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide or that, by his blunder, he had done some injury to the opponent which could not be compensated by cost or otherwise.

[11] In the same case Sharma J went on to quote the judgment of Brett MR in the case of *Claraoede & Co v Commercial Union Association* 32 WR 263:

> However negligent or careless may have been the first omission and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.

[12] Applying the above said principles to the present case, it is not unlawful for the third defendant to make the application for amendment at this late stage even after the submission of parties had been made. However

having regard to the nature and purpose of the amendment which was merely to state the correct and proper statute dealing with limitation to government proceedings and nothing else we could not find any good reason why we need to disturb the decision of the learned judge in allowing it. It is not in dispute that limitation had already been included by the third defendant as a ground of his defence. As to the question whether the plaintiff could be compensated by costs we could not find from the records that the plaintiff had argued the point that such amendment if granted could not be so compensated. Having regard to the nature of the amendment we are quite convinced that no compensation is required to be made by the defendant at all.

[13] We are also satisfied that the third defendant had made a genuine mistake in quoting the wrong statute in putting up the defence of limitation. It is true that Akta Prosiding Kerajaan 1956 is not the proper statute. The proper and correct statute is the Public Authorities Protection Act 1948.

[14] In our view the learned judge had judicially exercised his discretion when he allowed the third defendant's application to amend his statement of defence. In the circumstances we therefore dismissed this appeal with costs.

THE SECOND APPEAL

[15] This second appeal is consequential to the learned trial judge's decision dismissing the plaintiff's claims against all the three defendants. As stated earlier the plaintiff's claim against the defendants were for negligence and nuisance. As against the first and the second defendants the particulars of negligence are as follows:

(i) failure to develop benches on the quarry face;

(ii) failure to take into account during blasting operation the vertical and horizontal cleavage plane on the limestone formation;

(iii) failure to ensure that there was efficient drainage system between the hills and the main road;

(iv) failure to ensure that the resultant strength of the ground was adequate to prevent collapse of the loose eastern duct of the hill;

(v) failure to adopt proper blasting methods; and

(vi) failure to take responsible steps to remove the hazards on the hill when they became aware of the said hazardous condition of the hill.

[16] In respect of the third defendant the particulars of the negligence are as follows:

(i) failure to visit the site and to carry out proper investigations of the site to assess safely precautions before issuing the permit to extract rock materials under s 70 of the National Land Code on 1 January 1987;

(ii) allowing Gunung Tunggal to be quarried in 1987 even though the distance of the quarry to the Ipoh Kampar road was less than 200 metres, in contravention to the relevant guidelines issued by the Works Department that as a matter of safety no quarry operation can be conducted within 1 km (1000 metres) distance from any road;

(iii) failure to give any due consideration to the safety for remedial aspect of the operation when the quarry progressed on the easterly direction towards Lot 32752 and the Ipoh Kampar Road;

(iv) failure to take safety precaution to prevent the rock burst which could have been forseen as early as 1 January 1987; and

(v) failure to exercise its supervisory jurisdiction to check and monitor compliance of the conditions of the permits by the first defendant.

[17] As an alternative to the claims for negligence the plaintiff also alleged against the defendants that at the material time the collapse of the hill was a nuisance caused or permitted by each of the three defendants. The claim against the two defendant:

[18] The involvement of the second defendant who was the owner of the land was that he was the holder of the permit to remove rock materials from the said land. That land had been leased to the first defendant. It is not in dispute that the second defendant was not at all involved in the operation of the quarry and the removal of rock materials which were solely carried out by the first defendant. Therefore, on the claim for negligence based on the particulars as stated earlier the learned judge ruled there was totally no evidence to show the liability of the second defendant in negligence. The learned judge also found no evidence to show liability in nuisance against the second defendant.

THE CLAIM AGAINST THE FIRST DEFENDANT — NEGLIGENCE

[19] The main issue that the plaintiff has to prove against the first defendant on a claim for negligence is the casual connection between the first defendant's alleged careless conduct and the damaged suffered by the plaintiff (the causa causans). In other words the plaintiff must show on a balance of probabilities that the cause of his misfortune was due to the acts or omissions of the first defendant.

[20] Before considering the arguments by both parties it is pertinent to state the sequence of events immediately before and after the collapse of the hill. There had been continuous rainfall prior to the collapse of the hill which happened on 29 December 1987. But the first defendant's quarry operation had stopped work since 23 December 1987 because of the Christmas and New Year holidays. Immediately after the collapse of the hill, the State Authority took over the control of the hill and caused the remaining unstable rocks to be removed by blasting so as to avoid further calamity.

[21] As regards the issue of causa causans both parties relied on the evidence of their respective expert witnesses.

THE PLAINTIFF'S EXPERT WITNESS

[22] The plaintiff called S Pakianathan (PW1), a consultant in mining, mineral processing and metalurgical engineering to be his expert witness. PW1 made 2 visits at the site, namely on 12 January 1988 and 15 January 1988. Based on his two visits DW1 prepared a 63 page report (exh P1) entitled *An Investigation of the Causes of Rockburst at Gunung Tunggal, Perak*.

[23] PW1 attributed the collapse of the hill which caused the damage to the plaintiff's nursery to a force known as 'rockburst' which found to have been brought about directly by the operation of the quarry. He defined 'rockburst' to mean a case of disturbance of rock materials where strained energy or potential energy within the rock is released or converted into Kinetic energy. This will create a tensible force within the rock mass resulting in rock materials in trying to pull itself apart.

[24] During his site visits PW1 made the following observations:

(1) Faults are widespread on remaining portion of Gunung Tunggal. Two types of fault were distinguished; (a) a shear fault due to compressions and running parallel to the strike of the bed (b) tension fault running obliquely across the hill.

(2) The blasting had been carried out at two points GS2 and GS4 (of the plan in the report) the strength reduces as the distance from the blast point increases. As vibrations arised from the two points there is the central zone which experiences a complex combination of the two vibrations. For purpose of discussion, these vibrations are transformed into stress that contributes to the total operative stresses within the rock mass, (p 22 of exh PI)

(3) That the quarry face had been developed in a manner that posed maximum danger to the plaintiff's lot.

THE DEFENDANT'S EXPERT WITNESSES

[25] In disagreeing with the evidence of PW1, the first defendant called two expert witnesses namely, Senathi Rajah (DW1), a former consultant geologist and Chow Weng Sum (DW2), a government geologist attached to the Geological Survey Department Malaysia based in Ipoh. In 1987 DW2 was the officer who was assigned to investigate into the collapse of the hill.

[26] In his evidence DW1 explained that a rockburst and a rockfall are two completely different phenomena. In his opinion the collapse of the hill at Gunung Tunggal was due to a rockfall and not a rockburst.

[27] DW2 agreed with DW1 that the cause of the collapse was not due to rockburst but due to rockfall. In hi evidence DW2 stated that he went to the site on 29 December 1987 at 9am barely two and a half hours after the incident actually took place. He also made several visits after that first visit. Based on those visits DW2 observed that faults had existed on north south line on the hill and that there had been unstable overhangs on both the southern and eastern face (ie the face facing the plaintiff's land). The overhangs came about by fluctuation of sea level or by rain water erosion over a period of time undercutting the base of the hill. Because of the undercutting at the base of the hill, the top part of the hill lost its vertical support. DW2 also prepared a report on the incident (exh D3).

[28] The relevant part of DW2's report contained his finding relating to the cause of the collapse of the hill. It states:

> Factors leading to rockfall:
>
> Due to the chemical composition of limestone, weathering along planes of weakness such as shears, joint faults, is a natural long term process of denundation on the limestone hills. The cohesive strength across such planes of weakness is reduced and subsequently fails to support the rock slabs or blocks, thus giving rise to a rockfall.
>
> Apart from the geological factors mentioned above, a number of secondary causes could also have hastened the rockfall and they are:
>
> (a) incessant rain which can loosen the rock mass;
>
> (b) vibrations caused by blasting in the quarry
>
> In the case of Gunung Tunggal, the first rockfall occurred at the southern end of Gunung Tunggal, the first rockfall occurred at the southern end of the hill where a prominent limonite - stained joint striking 075 degree and dipping 80 degrees NNW intersected the base of an overhang giving rise to a slab of rock positioned in an unstable state (see figure 6).

A The incessant rain for the past few months reduced further the cohesive strength between the parent cliff and the overhanging. Regular variations caused by blasting activities in the quarry about 50 to 100 metres away further aggravated the situation and on the morning of 20 December 1987, the supporting forces holding the overhang gave way.

B The first rockfall upset the equilibrium of the eastern face, triggering off a chain of massive rockfalls along the unstable eastern face of Gunung Tunggal (see figure 7).

C **[29]** In his evidence DW2 did not agree with the finding of the plaintiff's expert witness, PW1, that the collapse of the hill was caused by a rockburst. According to DW2 a rockburst is caused by highly stressed rock or rapid instantaneous release of strained energy. This could occur at a tunnel or a mine because of the pressure of the mass of rock above the ground. On the D other hand a rockfall is caused by gravity at the point where faults normally occur, a rockburst can occur anywhere in the rock where the energy is concentrated.

E **[30]** It was DW2's view that the report of PW1 (plaintiff's expert) was not accurate because he did not have the benefit of a geological plan of the area and without such plan PW1 would not be able to locate precisely where the rockfall had occurred. The map used by PW1 (exh P1(a)) attached to his report only showed distribution of rock debris and location of the remaining F hill after the incident. Therefore it lacked the vital information as to the dip direction and dip angle of the fault and no major joints or fractures were mapped out. In his report, DW2 was able to map out all positions of the various faults, fractures and major joints of the hill and details of the dip and strike direction and had incorporated those maps into his report (Rajah 1 to G 7). In other words the report of DW2 was very much more comprehensive than the one produced by PW1. Even though DW2 did not rule out that vibration from blasting could possibly be a cause of the collapse but he maintained that the primary factor was attributable to natural causes.

H **[31]** Hence there appear to be two conflicting opinions between the opposing parties' expert as to what had caused the collapse of the hill. According to the plaintiffs expert witness (PW1) the collapse was caused directly by the vibrations from blasting of rocks by the first defendants quarry. I On the other hand, the defendant's experts attributed the collapse to the latent defects of the hill itself as manifested in the many faults and joints and unstable overhangs which ultimately over a period of time would lead to collapse, and the vibrations from the quarry operations being merely a secondary factor which might have aggravated the collapse.

FINDING OF THE HIGH COURT

[32] In his judgment the learned judge applied the principle that in order to find a defendant liable in negligence or nuisance the plaintiff must prove that the defendant's act was the effective cause of the injury or damage suffered. Based on this principle the learned judge proceeded to evaluate the evidence of the experts called by both parties. The main factor that he applied in determining whose evidence to accept was the meaning of the term 'Rockburst' and 'Rockfall'. As has been said above the plaintiffs expert attributed the collapse due to rockburst, whereas the first defendant's experts maintained that the collapse was due to rockfall and the primary factor being natural causes. As to the distinction between what constitutes 'rockburst' and what constitutes 'rockfall' the learned judge relied on the explaination given by Senathi Rajah (DW1) who made reference to the *Glossary of Geology*, by Ian Campbell, a publication of the American Institute of Geology which explaination the learned judge accepted to be correct and accurate:

> 'rockburst'. A sudden and often violent breaking of a mass of rock from the walls of a quarry tunnel, mine or other near surface or underground opening, caused by failure of highly stressed rock and the very rapid or instantaneous release or accumulated strained energy, often with closure of or projection of broken rock into the opening and accompanied by ground tremours, rockfalls and air concussion. Rockbursts are not likely to occur until a depth of 1000 metres (about 3000 feet) below the surface is reached.
>
> rockfall —
>
> (a) the relatively free falling or precipitous movement of newly detached segment of bedrock (usually massive homogeneous or jointed) of any size from a cliff or other very steep slope; it is the fastest moving landslide and is almost frequent on mountain areas and during spring when there is repeated freezing and thawing. Movement may be straight down, or a series of leaps and bounds down the slope; it is not guided by an underlying slip surface.
>
> (b) the mass of rock moving in or moved by a rockfall; a mass of fallen rock.

[33] In his evaluation the learned judge took into consideration that the collapse occurred six days after the quarrying operation had been shut down for Christmas and New Year holidays. His Lordship held the view that PW1's opinion that the cause of the collapse due to rockburst was untenable as at the time of incident the quarry operation had already shut down for six days. It would only be considered tenable if at the time of the collapse the quarry operation was in progress.

[34] On the other hand he found the postulation of DW2 to be fairly straight forward, firm in reasoning and was consistent with the fact that the collapse occurred while the quarry was not in operation. The learned judge also found the DW2's report to be a product of a careful and unbiased and independent study commissioned by a government department which commenced almost immediately after the collapse and undertaken without any forethought of litigation. After having considered the entire evidence, the learned judge concluded that the collapse could not be caused by rockburst but more likely due to rockfall as explained by DW2. As such the learned judge ruled that the plaintiff's claim in negligence against the first defendant must fail.

THE PLAINTIFF'S CLAIM AGAINST THE FIRST DEFENDANT — NUISANCE

[35] The learned trial judge held the view that our courts have been applying the civil law to include the English common law system by virtue of s 3 of the Civil Law Act 1956. Those common law of England existing after the coming into effect of the Act would not be applicable. Hence the common law of nuisance that existed in England before 7 April 1956 (date of enforcement) would be applicable in this country. However the Counsel for the plaintiff, contended that the principle developed in the English Court of Appeal case of *Leakey & Ors v National Trust for Places of Historic or Natural Beauty* [1980] 1 All ER 17 should be applied in this country.

[36] The development of the law of nuisance brought by the Leakey case is as follows. Prior to the *Leakey* case to succeed in nuisance the plaintiff must prove that the harm he suffered is the effect of the defendant's activity. The *Leakey* case had extended the area of liability of the defendant to include known or foreseeable damage or injury to other person or property. The learned judge ruled that the extended principle in the *Leakey* case is not applicable in this country. Hence the liability of the first defendant on a tort of nuisance against the plaintiff would have to be based on the effect of the first defendant's activities on the plaintiff. Since the damage to the plaintiff's land was not caused by the first defendant's quarry operation the learned judge ruled that the first defendant was not liable.

[37] But the learned judge went on to consider that even assuming that the principle in the *Leakey* case is applicable in this country it would be incumbent upon the plaintiff to show that the first defendant knew or ought to have known that the hill would collapse and having known of it had not done what was reasonable under the circumstances to prevent or minimise the risk of foreseeable damage to the plaintiff's land. In the instant case the learned judge found no such knowledge had been adduced on behalf of the

plaintiff at the hearing. The learned judge went on to say that to succeed under the *Leakey* principle the plaintiff must prove knowledge and not merely the foreseeability that the hill would collapse.

THE PLAINTIFFS CLAIM AGAINST THE THIRD DEFENDANT

[38] The third defendant is the Director of Land and Mines for the State of Perak. Two basic line of defence were put up by the third defendant, firstly, the power to grant the permit under s 70 of the National Land Code does not carry with it the responsibility to supervise the operational aspect of quarrying. And, secondly, by virtue of s 2(a) of the Public Authority Protection Act 1948 ('PAPA'), the plaintiff's action against the third defendant had far exceeded the allowable period of 36 months from the date of incident.

[39] The collapse of the hill happened on 29 December 1987 but the third defendant was only brought in as a party on 16 May 1992, a period of more than 4 years. It had far exceeded the 36 months period allowed by s 2(a) of PAPA which reads:

> Where after the coming into force of the Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuant or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provision shall have effect —
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within 36 months next after the act, neglect or default complained of, or in the case of a continuance of injury or damage within 36 months next after the ceasing thereof.

[40] Despite the clear provisions of s 2(a) of PAPA the counsel for the plaintiff maintained that the damage suffered by the plaintiff had not ceased and was still continuing at the time the suit was filed and therefore came within the ambit of the proviso 'a continuance of injury or damage, within 36 months' of the same section. However the learned judge totally rejected such argument. In his judgment the learned judge found that there was no repetition of the acts either in negligence or nuisance, after the collapse of the hill.

[41] As regards the duty of the third defendant in the issuance of the permit under s 70 of the National Land Code the learned judge relied on the evidence of Hj Ahmad bin Mat Jita, Timbalan Pendaftar Hak Milik Perak (DW6). He was a senior officer familiar with the issuance of permits of the nature that was issued to the first defendant.

A **[42]** According to PW6, in decising whether to grant such permit the only matter to be considered was the status of the land on which the rock material was to be removed, the quantity of rock material that would be extracted from the land, and the length of time to be taken to transfer the rock material from the land as the permit would be valid only for a certain period. It was **B** not the statutory duty of the third defendant to ensure the safety aspect of the quarry operation. The purpose of the issuance of the permit under s 70 of the National Land Code is for the removal of rock material and not for giving permission to operate the quarry.

C **[43]** Based on such evidence the learned judge ruled that the permit was issued by the third defendant only in respect of the removal of rock material from the land and not for the operation of the quarry.

D **[44]** However the plaintiff's counsel contended that based on the English Court of Appeal case of *Anns & Ors v London Borough of Merton* [1997] 2 All ER 492, which ruled that a statutory body conferred with the power (but not the duty) to supervise, may not be under a statutory duty of care but it may still be possible to attribute the common law duty of care to it.

E

[45] On such contention the learned judge was of the view that the principle in the *Anns* case can be distinguished from the instant case, since the facts are completely different. In the *Anns* case the Borough of Merton was conferred with the power to supervise the construction of the building, **F** whereas in the instant case the third defendant was merely conferred with the power to issue permit without any power to supervise the removal of rock material. Hence there was no duty of care to ensure that the rock materials were adequately supervised under the common law could exist under the circumstances.

G

[46] As regard the plaintiffs claim against the third defendant in nuisance the learned judge ruled that it was plain and obvious that the third defendant could not be held liable in the light of the fact that he was neither the occupier of the land where the nuisance was alleged to have originated nor **H** was he the cause of such nuisance.

FINDING OF THIS COURT

(a) Plaintiff's Claim Against The Second Defendant

I

[47] In view of the undisputed fact that the second defendant was merely the registered owner of the land which he had leased to the first defendant, who became the absolute occupier, we totally agree with the ruling of the learned trial judge that the second defendant could not be held liable against

the plaintiff both in negligence and in nuisance as he was not at all involved in the quarry operation nor in the removal of rock materials. We therefore dismissed the appeal with costs.

(b) Plaintiff's Claim Against The First Defendant

[48] The learned judge had made a very comprehensive consideration of the facts relating to this matter and had given a thorough and careful evaluation of the evidence of the witnesses especially those expert witnesses and their reports. He had also given adequate reasons in his finding of facts and application of the laws of negligence and nuisance to the facts of this case. We totally agree with him. As such we find no reason whatsoever to disagree with the learned judge's conclusion that the first defendant could not be held liable to the plaintiff in negligence and in nuisance. We therefore dismissed the plaintiff's appeal against the first defendant with costs.

(c) Plaintiff's Claim Against The Third Defendant

[49] On the basis of the provision of s 70 of the National Land Code the plaintiff should not have sued the third defendant at all. In our view the suit against the third defendant was vexatious and frivolous as it is very clear that the Director of Land and Mines only possessed the power to issue permit for removal of rock material. He was not given any supervisory power under s 70 of the Act. It is too remote to say that he is under a duty to take care statutorily or at common law. Coupled with the unexplained delay on the part of the plaintiff in instituting action against the third defendant, a government officer, thereby legitimatizing the application of s 2(a) of the PAPA to be invoked, it became glaringly improper for the plaintiff to continue to pursue the action against the third defendant. We therefore rule that the appeal against the third defendant be dismissed with costs.

Appeals dismissed with costs.

Reported by Andrew Christopher Simon